

1 You don't know that, that you've got every benefit plan there  
2 in front of you in that document file, do you?

3 MS. SCHMELTZER: Well, then, that should have been  
4 asked --

5 MR. LEADER: That's not the --

6 MS. SCHMELTZER: -- in discovery.

7 MR. LEADER: -- question you asked, Mr. Greenebaum.  
8 You asked --

9 MR. GREENEBAUM: -- in discovery.

10 MR. LEADER: It was asked in discovery.

11 JUDGE SIPPEL: Well --

12 MR. HOWARD: Well, then --

13 JUDGE SIPPEL: I, I think we're going to get to the  
14 point -- we're just going to have -- you're going to have to  
15 put a document in front of him --

16 MR. GREENEBAUM: I'll do that.

17 JUDGE SIPPEL: -- ask him questions. You're going  
18 to have to do that.

19 MR. GREENEBAUM: Thank you.

20 JUDGE SIPPEL: All right. Let's go off the record.  
21 (Off the record.)  
22 (On the record.)

23 MR. GREENEBAUM: Would you put Tab 30 in front of  
24 the witness, please?

25 JUDGE SIPPEL: I think if you find the -- you'll

1 find the Tab 30 in the binder in front of you, Mr. Smith.

2 BY MR. GREENEBAUM:

3 Q Do you have Tab 30 in front of you?

4 A Yes, sir.

5 Q That's entitled "The Health Care Benefits for the  
6 Employees Enrolled in the Sinclair Broadcast Group, Inc.,  
7 Employee Benefit Plan." Is that correct?

8 A High. That's the High Plan.

9 Q The High Plan is your description. That's not on  
10 the first -- I'm sorry. It's -- you're right. "High."

11 A I think there's a distinction.

12 Q You understand the employer under which this plan is  
13 offered to be Sinclair Broadcast Group, Inc.?

14 A Yes.

15 Q And did you understand at the time you enrolled in  
16 it that in order to be eligible to participate in this plan  
17 you had to be a regular full-time employee of Sinclair  
18 Broadcast Group, Inc., for at least 90 consecutive days?

19 A This happened so long ago I don't know what was  
20 going through my mind.

21 Q Would you turn to page FJS0095, the top of the page?  
22 See where it says, "Who is eligible"?

23 A Yes.

24 Q Would you read that to yourself, please, sir?

25 A Out loud?

1           Q     To yourself.

2                   JUDGE SIPPET: To yourself. Okay. Mr. --

3                   MR. GREENEBAUM: Did you understand -- or do you

4 understand now that you had to be a regular full-time employee

5 of Sinclair Broadcast Group, Inc., for at least 90 consecutive

6 days --

7                   MS. SCHMELTZER: Objection.

8                   MR. GREENEBAUM: -- to be eligible to enroll in this

9 plan?

10                  MS. SCHMELTZER: Objection. It's a compound

11 question.

12                  MR. GREENEBAUM: Uh-huh. I'll ask two questions.

13 Did you understand at the time, sir, that you had to be a

14 regular full-time employee of Sinclair Broadcast Group, Inc.,

15 at least 90 consecutive days in order to be eligible for this

16 plan?

17                  WITNESS: Well, when you say "when you" --

18                  MS. SCHMELTZER: Objection. At what time?

19                  JUDGE SIPPET: But -- objection is what --

20                  MR. LEADER: He said: do you understand at the

21 time. What time?

22                  MR. GREENEBAUM: At the time you enrolled.

23                  MR. LEADER: Well, say -- ask him that.

24                  MR. GREENEBAUM: All right.

25                  MR. LEADER: It could be today.

1           WITNESS: I never read this when I enrolled. This  
2 is one of those things we just did. As owners of the company,  
3 the people that take care of the stuff say here's your plan,  
4 here's what you got to sign, and you sign it.

5           MR. GREENEBAUM: Do you now understand that in order  
6 to participate in this plan you have to -- in order -- you  
7 have to be a regular full-time employee of Sinclair Broadcast  
8 Group, Inc., for at least 90 consecutive days?

9           MR. ZAUNER: Objection. His understanding today is  
10 irrelevant. As of this moment?

11          MR. GREENEBAUM: His pledge is still in effect.

12          MR. LEADER: No. What -- what did you try to --  
13 integration pledge is --

14          MS. SCHMELTZER: Objection. Question --

15          MR. LEADER: -- still in effect?

16          MR. HOWARD: His, his status as an employee of  
17 Sinclair is relevant as of today.

18          MS. SCHMELTZER: We're talking about the state of  
19 mind as of the time that we made the pledge, not as of today.

20          MR. HOWARD: His, his pledge continues as of today.  
21 He's --

22          JUDGE SIPPEL: Well, I'll --

23          MR. HOWARD: -- today is a relevant question.

24          JUDGE SIPPEL: I'll, I'll, I'll sustain the objec-  
25 tion. I, I understand what's --

1 BY MR. GREENEBAUM:

2 Q Were you a regular full-time employee of Sinclair  
3 Broadcast Group, Inc. -- had you been a regular full-time  
4 employee of Sinclair Broadcast Group, Inc., for at least 90  
5 consecutive days before you enrolled in this plan?

6 A I don't, I don't know the answer to your question,  
7 because I think you asked me two in a row. You're confusing  
8 me.

9 Q No, I don't think I did, in all fairness.

10 JUDGE SIPPEL: You, you really don't understand that  
11 question?

12 WITNESS: Can you bring it back?

13 BY MR. GREENEBAUM:

14 Q Were you a regular full-time employee of Sinclair  
15 Broadcasting Group, Inc., for 90 days prior to the time you  
16 enrolled in this health plan?

17 A I'll say it again, not like the traditional employee  
18 that checks in, fills out a time card, or whatever -- you  
19 know, what have you.

20 Q Are you scheduled to work --

21 A You're trying to make a distinction. I'm trying to  
22 help you make that distinction. But I --

23 JUDGE SIPPEL: Well, don't, don't try -- he's just  
24 -- try and answer his questions straight on. As he's asked  
25 them you answer them.

1 MR. GREENEBAUM: Your Honor, you sustained an  
2 objection a moment ago because it was phrased in the present  
3 tense. I would refer you to his paragraph 6 of his  
4 Declaration -- his, his direct testimony in which he says I  
5 did not at the time I gave my direct case testimony -- "I  
6 still do not consider myself to be an employee of Sinclair."  
7 So, he is, he is representing his present state of mind to the  
8 Court at this time.

9 MS. SCHMELTZER: Your Honor, that's -- that doesn't  
10 go to the health care benefit program, which could well, and  
11 apparently did, change over the years.

12 JUDGE SIPPEL: Well, I can't make that distinction.  
13 He said what he said in his direct testimony. I'll permit  
14 cross-examination on anything he said in his direct testimony.

15 MS. SCHMELTZER: Well, that's correct. But what I'm  
16 saying is this is apples and oranges. What he said in his  
17 direct case testimony does not go to the question that Mr.  
18 Greenebaum had asked.

19 JUDGE SIPPEL: Well, it's a very broad state-- it  
20 doesn't, it doesn't, it doesn't negate the subject that Mr.  
21 Greenebaum has been asking either. It just is a very broad  
22 statement. Broad statements are risky. Go ahead, Mr.  
23 Greenebaum. You can ask the question.

24 MS. SCHMELTZER: What is the question?

25 MR. GREENEBAUM: I'm not quite sure now.

1 JUDGE SIPPEL: He's going to ask you.

2 MR. LEADER: I can remember the question.

3 MR. GREENEBAUM: What was it?

4 MR. LEADER: The question was do you still consider  
5 yourself an employee of Sinclair today.

6 MR. GREENEBAUM: Correct.

7 MR. LEADER: You're welcome, Mr. Greenebaum.

8 MR. GREENEBAUM: Thank you.

9 JUDGE SIPPEL: How about that, Mr. Smith?

10 MR. GREENEBAUM: I don't think that was the precise  
11 question, but I'll take that one.

12 MR. LEADER: I think it was.

13 MR. GREENEBAUM: Okay.

14 WITNESS: And I think I answered, not in the tradi-  
15 tional sense that you're looking to see this employee who is  
16 to be eligible doing whatever he has to do.

17 MR. GREENEBAUM: All right.

18 MR. LEADER: I'm sorry.

19 BY MR. GREENEBAUM:

20 Q Are you scheduled to work 25 hours minimum per week  
21 at the present time?

22 A I don't have a work schedule.

23 Q Have you ever been scheduled to work a minimum of 25  
24 hours per week --

25 A No.

1           Q     -- since becoming -- since you started with  
2 Sinclair?

3           A     No.

4           Q     Do you understand at the present time that there is  
5 an eligibility requirement in the health plan that we're talk-  
6 ing about, that to be eligible you have to be a regular full-  
7 time employee of Sinclair Broadcast Group, Inc., for at least  
8 90 consecutive days before enrolling?

9                   MS. SCHMELTZER:  Objection, Your Honor.  What he --  
10 what this plan provides at the present time is totally  
11 irrelevant.

12                  MR. GREENEBAUM:  I'm asking his state of mind at the  
13 present time.

14                  JUDGE SIPPEL:  I'm going to permit the question.  Go  
15 ahead.  Overruled.

16                  WITNESS:  What was the question again?

17                  BY MR. GREENEBAUM:

18           Q     Whether or not you understand at the present time  
19 that in order to be a participant in this health plan that's  
20 been identified at Tab 30 you have to be a regular, regular  
21 full-time employee of Sinclair Broadcast Group, Inc., for 90  
22 -- for at least 90 consecutive days before enrolling?

23           A     You keep using the word "you."  I don't see myself  
24 as who this is made out to be.  However, I am part of it,  
25 but --



1 Q You're a participant, are you not, in this plan?

2 A To the best of my knowledge I am.

3 Q And I'm asking if you understand at the present time  
4 that in order to be a participant you had to be a regularly --  
5 a regular full-time employee of Sinclair Broadcast Group,  
6 Inc., for at least 90 consecutive days before enrolling?

7 A That's what that says.

8 Q Is that your understanding?

9 A That's what I understand that to say.

10 JUDGE SIPPEL: I think I'm going to move to another  
11 area. Let's go off the record.

12 MR. GREENEBAUM: Tab 32, please.

13 JUDGE SIPPEL: Oh, let's stay on the record.

14 MR. GREENEBAUM: Tab 32. Do you have that, sir?

15 WITNESS: Yes.

16 MR. GREENEBAUM: Now, this document has been  
17 admitted in evidence and I'd like to ask you if you've ever  
18 seen it before?

19 MS. SCHMELTZER: Before this proceeding? Is that  
20 what you're asking?

21 MR. GREENEBAUM: Before this proceeding, yes, if  
22 that's what you prefer.

23 WITNESS: Yes.

24 MR. GREENEBAUM: When did you first see it?

25 WITNESS: I don't know when I first saw it.

1 MR. GREENEBAUM: Are you a participant in the  
2 benefit program under these insurance benefits?

3 MR. HOWARD: The witness isn't looking at the right  
4 document.

5 WITNESS: This is 32, you say?

6 MR. LEADER: 32 -- that's what you --

7 MR. GREENEBAUM: It was Exhibit 40, Tab 32.

8 JUDGE SIPPEL: He's got it.

9 WITNESS: This?

10 MS. SCHMELTZER: Yes.

11 JUDGE SIPPEL: He's got it.

12 MS. SCHMELTZER: There was --

13 MR. GREENEBAUM: I'm sorry, Your Honor. It's a  
14 group insurance and these tabs are marked wrong. It should be  
15 Tab 31. I apologize.

16 JUDGE SIPPEL: One tab earlier.

17 MR. GREENEBAUM: Are you a participant in this  
18 program?

19 WITNESS: I don't --

20 MR. GREENEBAUM: Why -- look at it first.

21 WITNESS: I don't know if I am or not.

22 JUDGE SIPPEL: You have the reference now, Mr.  
23 Smith?

24 WITNESS: I don't know if I am or not.

25 BY MR. GREENEBAUM:

1 Q Have you ever seen this document prior to today or  
2 this proceeding?

3 A Possibly.

4 Q You don't recall it?

5 A Sort of, kind of, maybe. I don't know if I have or  
6 not.

7 Q Do you know what's required in order to be eligible  
8 to participate in these group benefits?

9 A I'm not versed enough in what this says to answer  
10 that. I guess your answer is no.

11 MR. GREENEBAUM: I'll move on, Your Honor.

12 BY MR. GREENEBAUM:

13 Q Would you look at Tab 29, please, sir? Do you have  
14 that, sir?

15 A Yes.

16 Q That's Sinclair Broadcast Group, Inc., Long-Term  
17 Disability Income Plan for Officers Only?

18 A Officers Only. That's correct.

19 Q And you're a participant in this plan?

20 A I would venture to say yes, considering I'm an  
21 Officer.

22 Q And do you know what was required in order to be  
23 eligible to make -- be in this plan?

24 A I haven't got the slightest idea.

25 Q Would you look at Tab 26, please, sir? Do you see

1 the Minutes of the meeting of September 17, 1992?

2 A Yes.

3 Q Were you a participant in that meeting reflected by  
4 these Minutes?

5 A I suppose I was, yes.

6 Q As, as you will see, it says, "The Board unanimously  
7 agreed..." Do you see that?

8 A Right.

9 Q Does that suggest to you that you were present?

10 A That's why I, that's why I said I suppose. I just  
11 -- I don't have explicit memories of this exact meeting, but  
12 it's on paper. It says it happened, it happened.

13 MR. GREENEBAUM: Show the witness Tab 28, Your  
14 Honor.

15 BY MR. GREENEBAUM:

16 Q Do you have Tab 28, Mr. Smith?

17 A Yes, sir.

18 Q And do you recognize that to be the Sinclair  
19 Broadcast Group, Inc., 401(k) Profitsharing Plan and Trust  
20 Summary Plan Description?

21 A Yes.

22 Q And do you participate in the Sinclair 401(k) --  
23 sir?

24 A I believe I do.

25 Q And, and is this something that was put into effect

1 by the Board since you have been a member?

2 A I don't know the answer to that.

3 Q Do you understand it's a plan that was put in in  
4 order to recognize the efforts of employees who have made the  
5 success -- made Sinclair successful --

6 A I'm sorry?

7 Q -- and to reward them by adopting a 401(k) Profit-  
8 sharing Plan and Trust?

9 A I, I didn't catch the whole question. I'm sorry.

10 MS. SCHMELTZER: Are you reading from something, Mr.

11 --

12 MR. GREENEBAUM: I'm, I'm referring to something.  
13 is that all right?

14 WITNESS: 401(k).

15 JUDGE SIPPEL: I think he doesn't -- are you --

16 WITNESS: I, I didn't --

17 JUDGE SIPPEL: -- question reread?

18 WITNESS: Yeah, please. I'm still on the 401(k).

19 MR. GREENEBAUM: What is your understanding of the  
20 purpose of this 401(k) plan?

21 MS. SCHMELTZER: Objection, Your Honor. What is the  
22 relevance of that question? It has nothing to do with the  
23 issue in this case.

24 JUDGE SIPPEL: I'm going to permit the question.  
25 Overruled. Go ahead.

1 WITNESS: I don't know the answer to that.

2 MR. GREENEBAUM: If you'll turn to FJS0034?

3 JUDGE SIPPEL: Referring to a page number. Are you  
4 following that, down in the right-hand corner?

5 WITNESS: Yes. Yes. Thank you.

6 MR. GREENEBAUM: do you see where it says at the  
7 beginning under "Summary Plan Description" "I. Introduction  
8 to your plan"?

9 WITNESS: Yes.

10 MR. GREENEBAUM: Would you read that to yourself,  
11 please, sir?

12 JUDGE SIPPEL: First paragraph?

13 MR. GREENEBAUM: Yes, sir.

14 WITNESS: Yes. I read it.

15 BY MR. GREENEBAUM:

16 Q And does this refresh your recollection that the 401  
17 plan was put in for the exclusive benefit of eligible  
18 employees and their beneficiaries?

19 A It doesn't refresh my recollection, but that's what  
20 it says so that's why we did it. My guess is that's boiler-  
21 plate language. Anyone who does a 401(k), probably all say  
22 the same thing. That's what 401s are all about, anyway.  
23 That's my understanding of what a 401 is.

24 Q And did you elect to defer a percentage of your  
25 income in order to participate in this plan?

1           A     I think I did, yes.

2                   JUDGE SIPPEL: Go off the record.

3                   (Off the record. On the record.)

4                   JUDGE SIPPEL: All right. We're back on the record.

5 We're going to take a break for lunch. Be back here at 1:15.

6 I just want to caution the witness not to discuss his

7 testimony with David Smith or your -- with any of the other

8 witnesses, in fact, in this case till after it's concluded.

9                   WITNESS: Yes, sir.

10                   JUDGE SIPPEL: Go off the record.

11                   (Whereupon, the luncheon recess ensued at 12:05 p.m.

12 on Tuesday, September 13, 1994; the proceedings to continue at

13 1:16 p.m.)

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1 AFTERNOON SESSION

2 JUDGE SIPPEL: We're on the record.

3 MR. GREENEBAUM: Your Honor, if I could maybe direct  
4 your attention to a few things and keep this thing moving.

5 JUDGE SIPPEL: Thank you.

6 MR. GREENEBAUM: We would like to move in at this  
7 time Robert Smith's Declaration which was attached to the Four  
8 Jacks Motion for Summary Decision of February 18, 1994, as  
9 Exhibit 45. I understand that David's was marked as an exhib-  
10 it yesterday.

11 JUDGE SIPPEL: And --

12 MR. GREENEBAUM: February 28. And we want to mark  
13 in Robert's today.

14 JUDGE SIPPEL: And what number are you giving this?

15 MR. GREENEBAUM: 45.

16 MS. SCHMELTZER: No, 46.

17 MR. GREENEBAUM: I'm sorry. 46.

18 JUDGE SIPPEL: Well, let me, let me -- all right.  
19 Before we mark that, let me just point out that we had left  
20 open No. 35 for Scripps Howard. If you check your list, you  
21 won't -- you'll find there's no exhibit for 35. And we could  
22 fill it in now with this.

23 MR. GREENEBAUM: That would be fine.

24 JUDGE SIPPEL: If that's all right? Then this will  
25 be marked as Scripps Howard Exhibit No. 35 for identification.



1 (Whereupon, the document referred to  
2 as Scripps Howard Exhibit No. 35 was  
3 marked for identification.)

4 MR. GREENEBAUM: Along the same lines, I spent some  
5 time at Robert Smith's deposition going through certain por-  
6 tion's of the SEC filings which had to do with his compensa-  
7 tion, his bonus, and the like. I did that yesterday with  
8 David Smith. I don't want to have to repeat it with Robert  
9 Smith and I was hoping that counsel for Four Jacks would  
10 stipulate that those, those figures in the SEC filings are  
11 correct. I'll give you -- and can use them for that purpose  
12 as to Robert. I can give you the deposition pages where we  
13 covered that and he testified that they were accurate numbers.

14 JUDGE SIPPEL: This, this Securities and Exchange  
15 Commission disclosures?

16 MR. GREENEBAUM: Yes, Your Honor. As to compen-  
17 sation.

18 JUDGE SIPPEL: Well, the disclosures in the SEC  
19 documents I'm going to -- I would certainly accept as, as  
20 accurate information unless somebody's going to object to it.

21 MR. GREENEBAUM: Your Honor, well, there seemed to  
22 be a little difference of opinion this morning as to what Your  
23 Honor had admitted, excluded. I just want to make sure we  
24 don't have any argument about it and that we can use the, the  
25 documents for whatever purpose you've admitted them for all

1 three witnesses?

2 JUDGE SIPPEL: Well, we -- as -- now, now, Tab 18,  
3 as I understand, that's the current SEC file. That's March of  
4 1994.

5 MR. GREENEBAUM: Okay.

6 JUDGE SIPPEL: And that one I permitted -- I, I  
7 received everything of that.

8 MR. GREENEBAUM: Well, how about Tab 14, Your Honor,  
9 for example? That's from 1992.

10 JUDGE SIPPEL: That's correct. Those are only the  
11 pages that were testified to plus the cover page right now.

12 MR. GREENEBAUM: I just want to make sure that to  
13 the extent they're in they're in as to all three witnesses.

14 MS. SCHMELTZER: To the extent -- what's -- I mean,  
15 you, you just --

16 MR. GREENEBAUM: Now --

17 MS. SCHMELTZER: -- earlier were talking about the  
18 compensation figures. You examined Mr. David Smith on the  
19 compensation figures. He didn't disagree with you. You --  
20 that page is in.

21 JUDGE SIPPEL: That page is in. I'm -- I would  
22 think that the other, the other principal's compensation would  
23 be at the same pages. Are they?

24 MR. GREENEBAUM: They are, yes.

25 MS. SCHMELTZER: One --

1           MR. GREENEBAUM: I just don't want to have any  
2 argument that well, you didn't, you didn't go into that with  
3 Robert Smith, so the Judge's ruling, it's only on Mr. David  
4 Smith.

5           JUDGE SIPPEL: I understand. Anything that's on  
6 that page that pertains to compensation of principals is, is  
7 fair game. What I said is that what is -- what pages are  
8 excluded would not be fair game.

9           MR. GREENEBAUM: I understand. I just want to make  
10 sure what's in is in for all three.

11          JUDGE SIPPEL: All right.

12          MR. GREENEBAUM: Then, Your Honor --

13          JUDGE SIPPEL: Well, are you going to move this in  
14 then? I'm sorry. No. S35 for --

15          MR. GREENEBAUM: Yes.

16          JUDGE SIPPEL: -- identification?

17          MR. GREENEBAUM: I move that in at this time.

18          JUDGE SIPPEL: Any objection?

19          MR. ZAUNER: I think it should be properly identi-  
20 fied first. It's --

21          JUDGE SIPPEL: Well, I'm about to do that. This is  
22 the Declaration of Robert Smith, the witness here today, and  
23 it's executed the 28th day of February, 1994, and it's a, it's  
24 a four-page document including the cover sheets. And this was  
25 used in conjunction with a Motion for Summary Decision.

1 MR. GREENEBAUM: Yes.

2 JUDGE SIPPEL: Any objection to it being received?

3 MS. SCHMELTZER: No, Your Honor.

4 MR. ZAUNER: No.

5 JUDGE SIPPEL: It's in evidence now as Scripps  
6 Howard No. 35.

7 (Whereupon, the document marked for  
8 identification as Scripps Howard  
9 Exhibit No. 35 was received into  
10 evidence.)

11 MR. GREENEBAUM: Your Honor, there's -- the -- your  
12 rule -- actually, it was -- I guess it was yesterday, or maybe  
13 it was this morning, about that you didn't want any questions  
14 about the loans, and I told you I'd like to make a proffer --

15 JUDGE SIPPEL: You said you want to make a proffer,  
16 yes, sir.

17 MR. GREENEBAUM: And the proffer's in connection  
18 with Tab 20. And the, the transcript of the hearing Deposi-  
19 tion taken on July 20, 1994, of this witness, and for the  
20 Court pages 77 through top of 80, it's actually placed on 76.  
21 There's one question on line 15. "The Sinclair Broadcasting  
22 Group, Inc., had a loan program for its employees." That's  
23 the way it starts. But the -- on 78 and seven.

24 JUDGE SIPPEL: On page 78?

25 MR. GREENEBAUM: 77. It starts on line seven would

1 be the substance -- or I guess it should be line 2.

2 JUDGE SIPPEL: Where it says, "Do you have a loan  
3 program?"

4 MR. GREENEBAUM: And, and I guess I mislead the  
5 Court a moment -- it's Tabs 20, 21, and 22, and 19. It's --

6 MS. SCHMELTZER: I don't understand what the proffer  
7 is?

8 JUDGE SIPPEL: The proffer is what he said has been  
9 testified to in that page 77 at line 3 -- through page 80 of  
10 the Deposition?

11 MR. GREENEBAUM: Yes, Your Honor. Page -- no, it's  
12 through, through page 81, line 13.

13 JUDGE SIPPEL: All right. Well, I'll tell you, I'm  
14 going to allow you to do this. It's in the form of a proffer  
15 and it will be considered as a proffer. Prepare an exhibit --  
16 we'll be back tomorrow with another witness. Prepare an  
17 exhibit, an appropriate --

18 MR. GREENEBAUM: As to his testimony?

19 JUDGE SIPPEL: -- proffer. As to the testimony from  
20 the, from the Deposition. It's coming in as a proffer and  
21 there will be no Findings on it.

22 MR. GREENEBAUM: Well, what I want to do is cross-  
23 examine this witness about it at this time.

24 JUDGE SIPPEL: Well, no, not on a proffer. All  
25 you're telling me is -- in a proffer is, is that, that if he

1 | were permitted -- if you were permitted to, to, to take testi-  
2 | mony on this line that this is what the evidence would show.

3 |           MR. GREENEBAUM: All right.

4 |           JUDGE SIPPEL: So, you -- that would go up with the  
5 | record on, on review if, if I'm in error. But --

6 |           MR. GREENEBAUM: I was hoping Your Honor would  
7 | reconsider your ruling as to this witness. That was the  
8 | reason for the proffer, and I didn't want to argue it as to  
9 | David Smith, which was your major ruling.

10 |           JUDGE SIPPEL: Well, I'm going to have to, I'm going  
11 | to have to go off the record and read then.

12 |           MR. GREENEBAUM: I would suggest, Your Honor, if you  
13 | read page 81 you'll see where I want to get to it.

14 |           JUDGE SIPPEL: I'm going to read page 77 to 81.

15 |           MS. SCHMELTZER: Your Honor, we have no -- Mr., Mr.  
16 | Greenebaum still has not told us where -- what the proffer is,  
17 | what -- where this proffer is going.

18 |           MR. GREENEBAUM: I don't want to educate the wit-  
19 | ness, but I --

20 |           MS. SCHMELTZER: Well, the witness can leave the  
21 | room.

22 |           JUDGE SIPPEL: We'll, we'll excuse him.

23 |           MR. GREENEBAUM: I don't -- he doesn't have to, as  
24 | far as I'm concerned. I just don't want to, don't want to  
25 | make sure that -- it's her call.

1 JUDGE SIPPEL: No. I'm going to excuse the witness.  
2 It's my call. Go off the record till he leaves the room and  
3 I'm going to read this page.

4 (Whereupon, the witness was temporarily excused from  
5 the courtroom.)

6 (Off the record. On the record.)

7 JUDGE SIPPEL: All right. I've read the pages in  
8 the Deposition. Now, would you make a specific proffer, that  
9 is, in terms -- if we consider this evidence, what is it going  
10 to show in terms of relevant evidence?

11 MR. GREENEBAUM: I, I think it shows that there was  
12 some kind of a program, I don't want to mischaracterize it as  
13 formal or informal --

14 JUDGE SIPPEL: I understand.

15 MR. GREENEBAUM: -- that was available to  
16 "employees" and that at least Robert Smith, as exhibited by  
17 Tabs 20, 21, 22, and 19, and David Smith, as exhibited by Tabs  
18 23 and 24, all of which Your Honor has ruled out, not  
19 admissible --

20 JUDGE SIPPEL: Yes.

21 MR. GREENEBAUM: -- took advantage of and got the  
22 benefit of the same as other employees and that these notes  
23 are consistent and they show some kind of a -- of an arrange-  
24 ment that was available to employees to these, just as it was  
25 to other employees who are not exact "true employees." And

1 for whatever that's worth, I think it's another brick on the  
2 wall I'm trying to build, which I spelled out very clearly to  
3 Your Honor, and, and, and therefore I believe it's relevant  
4 for that purpose to show their state of mind, that they did  
5 everything that everybody else did and they never did anything  
6 except what everybody else did.

7 JUDGE SIPPEL: Ms. Schmeltzer?

8 MS. SCHMELTZER: Well, I don't think that -- I would  
9 disagree with Mr. Greenebaum's characterization of how the  
10 loans worked. We did not object to those actual promissory  
11 notes that the brothers executed coming into the record. In  
12 fact, we agreed -- I think Your Honor put it quite well --  
13 that they were owners -- it showed they were owners of the  
14 company and could take out substantial loans. I don't think  
15 there is any evidence in the record that the kinds of loans  
16 that employees could take out were similar. There's nothing  
17 in the record to show that employees could take out loans of  
18 \$100,000. So, I don't see where Mr. Greenebaum's going with  
19 all this.

20 JUDGE SIPPEL: Well, he said -- I, I understand what  
21 Mr. Greenebaum is saying. I know where he's going. I'm not  
22 --

23 MS. SCHMELTZER: I don't think he's going to get  
24 where he's going.

25 JUDGE SIPPEL: Well --



1 MS. SCHMELTZER: His Deposition --

2 JUDGE SIPPEL: -- that's --

3 MS. SCHMELTZER: -- doesn't prove that he's going to  
4 get where he's going.

5 JUDGE SIPPEL: Well, all right. Let me hear from  
6 Mr. Zauner.

7 MR. ZAUNER: Well, I, I agree with Mrs. Schmeltzer.  
8 When Mr. Smith was first asked do you have a loan program, he  
9 says, a formal one, no. And what -- the way I read his  
10 deposition testimony was that on an ad hoc basis if somebody  
11 needed a loan they would come and get one, but there was no  
12 program per se. I know at the end of the deposition, towards  
13 the end of what we were asked to read, he does seem to agree  
14 with counsel's characterization of the system giving loans as  
15 a program; but I don't think if you read what he actually  
16 testifies to about it it supports that conclusion. And I  
17 would also agree that the fact that he took a loan himself is  
18 also consistent with him as a owner of the company taking the  
19 loan from the company he owns. I don't think it advances us  
20 one iota into a determination that in fact he was somehow an  
21 employee in some sense because he took this loan. There are  
22 other documents that do that in other ways, but, but these,  
23 these I don't see doing that.

24 JUDGE SIPPEL: Do you want to respond to any of that  
25 before I rule?